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No. 92-558

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

VALENTEC KISCO, INC.,
Petitioner,

vs.

JAMES WILLIAMS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENT JAMES WILLIAMS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, under *Burdine*, the contention that in order for an ADEA plaintiff to prove pretext, the plaintiff must not only discredit the employer's proffered reason for the employment decision, but also adduce additional evidence that the employer was motivated by a discriminatory animus, presents an issue worthy of review, particularly where the plaintiff has presented direct evidence of discriminatory animus on the part of the employer.

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to the proceeding are respondent, James Williams, an individual, and petitioner, Valentec Kisco, Inc., a corporation. The names of all the parties appear in the caption of the case.

TABLE OF CONTENTS

	Page
Question Presented	i
List of all Parties to the Proceeding	ii
Table of Authorities	iv
Official and Unofficial Citations	1
Jurisdictional Statement	1
Statement of the Case	2
Argument	5
Conclusion	11
Certificate of Service	12

TABLE OF AUTHORITIES

Page(s)

Cases:

Beshears v. Asbill, 930 F.2d. 1348 (8th Cir. 1991) 6

Clements v. General Accident Insurance Co. of America, 821 F.2d 489 (8th Cir. 1987) 6

Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) 10

International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977) 7

Lorillard v. Pons, 434 U.S. 575 (1978) 7

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 6

Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5 (lst Cir. 1990) 5

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 5

Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985) 7

U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983) 6

White v. Vathally, 732 F.2d 1037 (lst Cir. 1984) 5

Other Authorities:

29 U.S.C. 623(a) 1

Lanctot, "The Defendant Lies and the Plaintiff Loses: The Fallacy of the 'Pretext-Plus' Rule in Employment Discrimination Cases," 43 Hastings Law Journal 59 (November 1991) 5

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OFFICIAL AND UNOFFICIAL CITATIONS

The opinion of the Court of Appeals for the Eighth Circuit in the present case is reported at 964 F.2d 723 (8th Cir. 1992). The decision of the District Court in the present action is unreported.

JURISDICTIONAL STATEMENT

The present action arises under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621-633. The provision of the ADEA involved in the instant case is as follows

> **Prohibition Of Age Discrimination.** (a) Employer Practices. It shall be unlawful for an employer — (1) to fail to

> or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a).

The Court of Appeals affirmed the District Court's judgment that petitioner had discriminated against respondent in his employment on the basis of respondent's age. Because the decision below is correct and does not raise any question warranting review by this Court, respondent James Williams respectfully urges this Court to deny the pending petition.

STATEMENT OF THE CASE

Petitioner's statement of the case is inaccurate and omits pertinent facts. Therefore, Respondent James Williams deems it necessary to make the following statement of the case.

Petitioner manufactures grenades and Army parts. At the time of the events at issue, respondent James Williams was fifty-one years of age. Approximately four and a half months prior to his discharge, respondent switched from the second shift to the third shift at Valentec Kisco. After working on the third shift for some three weeks, respondent asked to be transferred back to the second shift. Respondent's supervisor, Norman Leigh, told respondent that the only job available on the second shift was a sealer position. The sealer position required an employee to lift a box of grenades weighing approximately 67 pounds, seal the box, and load it on to a skid located next to the assembly line. The respondent informed Leigh that he would prefer to stay on the third shift if the sealer position was the only job available. Leigh told respondent that he had to return to the second shift, and respondent returned to second shift. Although Leigh testified that respondent had requested a permanent shift change to the second shift, there existed no documentation in the respondent's file concerning the shift change, as was customary under company rules regarding permanent shift changes.

On March 11, 1987, respondent reported for work, and Leigh assigned respondent his job duties. After working some two and one-half to three hours in the sealer position, respondent took a break. Before respondent went on break, there was a nearly-full skid of boxes respondent had been loading approximately two feet from his position on the assembly line. When respondent returned from break, the skid had been moved from its previous position and no new skid had been put in its place. Leigh told Williams that he had ordered the skid moved in his absence. As a matter of custom, the sealer instructed the skid to be moved away from the assembly line by a tow loader when it was nearly full.

Respondent then obtained a hand dolly located some ten feet from the assembly line, intending to place the grenade boxes on the dolly and move them from the line to the skid Leigh had moved. Leigh told the respondent that he could not use the dolly and ordered respondent to accompany him to the Leigh's office. There, respondent and Leigh were joined by foreman Sam Asbrock and by the shop steward. Leigh told Asbrock what had transpired on the line and that respondent had refused to do his job. Asbrock asked Leigh what he was doing with an "old man carrying the boxes anyway." When the shop steward asked Leigh why he objected to the respondent using the two-wheeler, Leigh stated that he was going to "fire this son of a bitch."

Leigh suspended respondent pending an investigation. The disciplinary report prepared by Leigh stated that respondent had refused to accept his job assignment. While respondent had informed Leigh on that day that he was having medical problems, Leigh did not send respondent to see a doctor as was required by company policy.

There existed no written rule at Valentec Kisco prohibiting employees from using a dolly to move boxes from the line to the skid, nor did company literature state that a dolly could not be

used in this fashion due to any safety hazards. Valentec Kisco's safety rules did state, however, that employees were not to attempt to lift weights that were too heavy for them. Respondent had previously used a dolly to move grenades from one place to another while working on the second shift, and no one had ever informed him during that time that he was not to use the dolly in that fashion.

Petitioner eventually terminated the respondent and replaced him with a thirty-year-old male, who left shortly thereafter on medical leave and was then replaced by a twenty-year-old male.

Respondent filed his First Amended Complaint against petitioner in the United States District Court for the Eastern District of Missouri alleging that petitioner had discharged him because of his age in violation of the ADEA. Respondent's age discrimination claim was submitted to the jury on a *McDonnell Douglas/ Burdine* theory. The jury found in favor of respondent and awarded $85,000 in compensatory damages. Petitioner appealed the judgment in favor of respondent to the United States Court of Appeals for the Eighth Circuit, which affirmed.

REASONS FOR DENYING THE WRIT

Petitioner claims that certiorari is proper to resolve the issue of whether, under the Court's unanimous decision in *Texas Department of Community Affairs v. Burdine*, 450 U.S 248, (1981), an ADEA plaintiff must make a showing of "pretext-plus"[1] in order to prevail. This claim is premised upon what petitioner describes as a "notorious split" in the circuit courts regarding the evidentiary showing necessary for a plaintiff to prove pretext in a disparate treatment action and upon a perceived "ambiguity" in this Court's decision in *Burdine*. (See Petition for Certiorari at page viii, 1,3). Building on these tenuous foundations, plaintiff contends that certiorari is appropriate since a small minority of federal courts interpret *Burdine* to require a dual showing at the pretext stage in which the plaintiff must not only negate the employer's proffered reason for the employment decision but also affirmatively demonstrate that the real reason for the employment decision was discriminatory intent.[2]

In offering this contention, the petitioner does not present an issue worthy of review by this Court. The "pretext-plus" theory

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[1] The "pretext-plus" theory provides that an ADEA claimant cannot meet his burden of proof on pretext simply by refuting or questioning the employer's articulated reason for the adverse employment action. The plaintiff must also present direct evidence showing that the employer was motivated by a discriminatory animus. *See, e.g., Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 9 (1st Cir. 1990); *White v. Vathally*, 732 F.2d 1037, 1042-43 (1st Cir. 1984).

[2] In its Petition for Certiorari, Valentec Kisco adopts the discussion of the "pretext-plus" theory set forth by Katherine Lanctot in an article, "The Defendant Lies and the Plaintiff Loses: The Fallacy of the 'Pretext-Plus' Rule in Employment Discrimination Cases," 43 Hastings Law Journal 59 (November 1991), which rejects the "pretext-plus" rule as "fundamentally inconsistent with traditional principles of employment discrimination law and of evidence." *Lanctot*, 43 Hastings Law Journal at 67.

asserted by petitioner is directly contrary to the long-standing framework for analyzing disparate treatment cases set forth by this Court in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973); *Texas Department of Community Affairs v. Burdine*, and *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983). It places an evidentiary burden on plaintiffs that precludes a showing of discrimination through the use of indirect evidence. Moreover, the "pretext-plus" theory is irrelevant to the present case, since respondent presented direct evidence of petitioner's discriminatory animus at trial.

I.

THE WRIT SHOULD BE DENIED BECAUSE THE "PRETEXT-PLUS" THEORY IS IRRELEVANT TO THE PRESENT CASE, SINCE RESPONDENT PRESENTED DIRECT EVIDENCE OF PETITIONER'S DISCRIMINATORY ANIMUS.

The present case is not a proper vehicle in which to grant certiorari for the purpose of addressing a "pretext-plus" issue, since the respondent presented direct evidence of petitioner's discriminatory animus. At trial, respondent reiterated the question asked by foreman Asbrock of respondent's supervisor, Norman Leigh, as to what Leigh was doing with an "old man carrying the boxes anyway." (*See* Opinion, at p. 6, incorporated as Appendix A to Petition for Certiorari). Asbrock was a signatory to the discipline report on respondent prepared by Leigh. This statement constituted direct evidence of discriminatory intent on the part of the petitioner, *see, e.g., Beshears v. Asbill*, 930 F.2d 1348, 1354 (8th Cir. 1991); *Clements v. General Accident Insurance Co. of America*, 821 F.2d 489, 492 (8th Cir. 1987), and was recognized as such by the Eighth Circuit. (See, Opinion of the Court of Appeals for the Eighth Circuit, Appendix A, p. 18). Where a plaintiff presents direct evidence of discrimination, the burden shifting test of *Burdine* is inapplicable. *See,*

Trans-World Airlines, Inc., v. Thurston, 469 U.S. 111, 121 (1985); *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 358 n.44, (1977). Since the three stage analysis for discrimination cases enunciated in *Burdine* is inapplicable, the "pretext-plus" issue is simply irrelevant to the instant case. For this reason, the facts at issue do not present a proper scenario for this Court to address the "pretext-plus" question. Accordingly, the Petition for Certiorari does not present an issue worthy of review by this Court.

II.

THE WRIT SHOULD BE DENIED BECAUSE THE "PRETEXT-PLUS" THEORY ASSERTED BY PETITIONER IS DIRECTLY CONTRARY TO THE ANALYTICAL FRAMEWORK FOR DISCRIMINATION CASES ESTABLISHED BY THIS COURT IN *MCDONNELL DOUGLAS, BURDINE*, AND *AIKENS* AND PLACES UPON AN EMPLOYMENT DISCRIMINATION PLAINTIFF AN ADDITIONAL EVIDENTIARY BURDEN THAT IS NOWHERE SANCTIONED BY SUPREME COURT PRECEDENT.

The "pretext-plus" theory advanced by the petitioner does not present an issue worthy of review since it is directly contrary to the long-standing analytical framework for disparate treatment discrimination cases established by this court in *McDonnell Douglas, Burdine*, and *Aikens*. Under the *McDonnell Douglas/ Burdine* framework, the analysis proceeds in three stages.[3] First, the plaintiff has the initial burden of establishing a prima facie case of disparate treatment that raises an inference of discriminatory intent. *Burdine*, 405 U.S. at 252-53. Establishment of a prima facie case creates a presumption that the employer unlaw-

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[3] This Court applies Title VII Supreme Court precedent in age discrimination cases to aid in the interpretation of substantive provisions of the ADEA. *See, TWA v. Thurston*, 469 U.S. 111 (1985); *Lorillard v. Pons*, 434 U.S. 575, 584 (1978).

fully discriminated against the employee. *Burdine*, 450 U.S. at 254. If the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff. *Burdine*, 450 U.S. at 254.

Next, the burden shifts to the defendant to rebut the presumption of discrimination by producing evidence of a non-discriminatory reason for its actions. *Burdine*, 450 U.S. at 254. If the employer carries its burden of production, the plaintiff is given the opportunity to demonstrate that the proffered reason is pretextual, that is, it is not the true reason for the employment decision. *Burdine*, 450 U.S. at 256. A plaintiff may meet this burden in one of two ways:

> "*either directly* by persuading the court that a discriminatory reason more likely motivated the employer *or indirectly* by showing that the employer's proffered reason is unworthy of credence."[Emphasis added].

Burdine, 450 U.S. at 256; *Aikens*, 460 U.S. at 716. The *McDonnell Douglas/Burdine* framework requires that a plaintiff prevail at the third stage of a discrimination case where the plaintiff demonstrates that the proferred reason given by the employer is in fact not the true reason for the employment decision. *Aikens*, 460 U.S. at 718, *J.J. Blackman and Brennan*, concurring.

The "pretext-plus" theory advanced by petitioner violates the explicit alternative method of proof enunciated by this Court in *McDonnell Douglas*, *Burdine*, and *Aikens*. These decisions clearly establish that a plaintiff may prove pretext *either directly* by persuading the Court that a discriminatory reason more likely motivated the employer *or indirectly* by showing that the employer's proffered reason is unworthy of credence. *Burdine*, 450 U.S. at 256; *Aikens*, 460 U.S. at 716.

The "pretext-plus" theory advanced by petitioner would permit a discrimination plaintiff to make a submissible case only

when he/she can demonstrate direct evidence of discrimination. Such a limitation violates the clear admonition of this Court that it is reversible error for a trial court to require a plaintiff to produce direct evidence of discrimination.[4] This Court has explicitly held that a discrimination case may be established by indirect evidence. *Thurston*, 469 U.S. at 121; *Aikens*, 460 U.S. at 717; *Burdine*, 450 U.S. at 255-256 n.10. This court established the indirect method of proving pretext because age discrimination, as well as other forms of discrimination, are subtle, and there is very seldom direct evidence of discriminatory animus available. *See, Aikens*, 460 U.S. at 715.

Petitioner has advanced several arguments in support of the "pretext-plus" theory. It suggests that adherence to the *Burdine* model of showing pretext by discrediting the employer's explanation, without requiring a plaintiff to produce additional evidence of discriminatory intent, allows an age discrimination plaintiff to impermissibly shift the ultimate burden of proof to the employer. (*See, Petition for Certiorari* at 19-21). This assertion is groundless and ignores the *explicit* holding of this Court in *Burdine* that permits a plaintiff to prove pretext "indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256.

Petitioner claims the "pretext-plus" theory is supported by language in *Burdine* indicating that where defendant has presented a legitimate reason for its actions the burden of proving pretext merges with the plaintiff's ultimate burden of proving discrimination. Petitioner's argument is misplaced. In its proper

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[4] *See, Aikens*, 460 U.S. at 714 n.3 ("As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever credence it deserves . . . [T]he district court should not have required the plaintiff to submit direct evidence of discriminatory intent."). *See also, International Brotherhood of Teamsters v. U.S.*, 413 U.S. 324, 358 n.44 (1977) ("The *McDonnell Douglas* formula does not require direct proof of discrimination.")

context, this language clearly indicates that once a defendant has stated a legitimate reason for its actions, the plaintiff's burden is to prove discrimination either by direct evidence, or indirect evidence (by showing defendant's stated reason is pretextual). The language of the Court could not be any clearer: A plaintiff may meet his ultimate burden in an age discrimination case by discrediting the employer's proffered reason. No additional evidence is needed for the plaintiff to prove intentional discrimination.[5] Thus, petitioner's claim that the plaintiff's retention of the burden of proof requires additional evidence of discriminatory intent in order for the plaintiff to prevail is without support in *Burdine* or its progeny. A plaintiff's reliance on proof that the employer lied about the reasons for its employment decision simply does not shift the burden of proof to the employer.

Finally, petitioner argues that there is a split of authority in the circuits regarding the *Burdine* holding. This purported split is more philosophical than real. It arises from a misreading of *Burdine* and other Supreme Court precedent by a small minority of federal courts and apparently is fueled by a desire to reduce the number of discrimination cases pending on federal dockets. While some may believe that reducing the number of discrimination cases pending on federal dockets is a proper goal, this Court should not reach that goal by placing an insuperable evidentiary burden on age discrimination plaintiffs that is wholly unsupported by Court precedent.

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[5] This Court has stated that once all legitimate reasons have been eliminated for an employer's conduct, it is fair to assume that the only remaining reason is discrimination. *Furnco Construction Co v. Waters*, 438 U.S. 567 (1978). It is on this principle that the entire *Burdine* indirect prong analysis is based. Therefore, when the only legitimate reason offered by the defendant turns out to be untrue, it is entirely consistent with this Court's precedent to presume that it is more likely than not that the employer, who is generally assumed to act only with some reason, based his decision upon an impermissible consideration such as age or race. *Furnco, supra*, 438 U.S. at 577.

CONCLUSION

The decision of the Court of Appeals is correct and fully comports with the decisions of this Court. The Petition for Writ of Certiorari presents no issue worthy of this Court's consideration, and it should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari were served upon Petitioner Valentec Kisco by mailing same by ordinary first class mail, postage prepaid, to William T. Weidle, Jr., Attorney for Petitioner, at 4232 Forest Park Blvd., St. Louis, MO 63108 on this 30th day of October, 1992.

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